In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1050

KOMMANVITTSELSKAPET HARWI (ROLF WIGAND), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners commenced this action in the United States District Court for the Eastern District of Pennsylvania under the Suits in Admiralty Act (46 U.S.C. 742). They alleged that the United States was liable for damages of approximately $200,000.00 to the hull of the vessel Gerwi, incurred when the Gerwi struck some rocks in a channel (the "Torresdale Range") of the Delaware River while passing a dredge and drill flotilla at work in the area of the grounding. Following a lengthy trial, the district court held that the United States was not liable under any of the theories urged by petitioners (Pet. App. A1-A24). A divided court of appeals initially reversed (Pet. App. A25-A40). On rehearing, the judgment of the district court was affirmed (Pet. App. A41-A47), one judge dissenting.

The material facts can be briefly stated. On May 23, 1963, the vessel Gerwi, drawing almost 28 feet of water, left Philadelphia and headed up the Delaware River to Morrisville, Pennsylvania. It was only the fifth ship that size ever to make the trip (Pet. App. A9).[1] As the Gerwi entered that part of the river known as the Torresdale Range, it encountered a dredge and drill flotilla working in the area. The flotilla was dredging a new 40-foot "project" channel at a point where the "project" partially overlapped the existing 25-foot channel (Tr. 42-43).

The pilot of the Gerwi, Lappe, maneuvered the ship to the left half of the 25-foot channel to pass the dredging equipment (Pet. App. A4); as the Gerwi came abeam the drill boat, it struck rocks, causing some leakage (Tr. 197). The pilot was able to trim the vessel close to an even keel and complete the voyage to Morrisville without further incident (*ibid.*).

Petitioners argue here, as they did below, that the government was responsible for the grounding because the channel depth statement it issued on May 3, 1963, was so negligently drawn as to be misleading. That channel statement, which is reproduced at Pet. App. A7, accurately reported, *inter alia*, the depths in the 40-foot "project" channel then under construction in the Torresdale Range. Petitioners contend that the reported depths could have been misread as pertaining to the shallower 25-foot channel, thereby causing Pilot Lappe to sail the Gerwi through the smaller channel on the mistaken

---

[1] The Pilots Association decided for the first time on May 10, 1963, to try to take vessels with a draft of 28 feet upriver. The four vessels that size preceding the Gerwi made the trip on May 12, 13, 18 and 21, respectively (Pet. App. A8-A9).

assumption that it could accommodate a vessel drawing 28 feet of water.

Even assuming *arguendo* that the channel statement could be so misinterpreted,[2] both courts below determined that the record showed that Pilot Lappe and his crew had not relied on the accuracy of this statement in taking the Gerwi upriver, and thus it was not a cause of the grounding (Pet. App. A46).[3] As indicated in the memorandum opinion of the district court (Pet. App. A20-A22), the separate opinion of Judge Van Dusen, dissenting, when the case was initially decided by the court of appeals (Pet. App. A33-A40), and the majority opinion of the court of appeals on rehearing (Pet. App. A41-A47), that finding

---

[2] The district court found that the May 3 channel statement was unambiguous and clearly "referred to the 40 [foot] project range" (Pet. App. A21). That finding was not disturbed by the court of appeals.

[3] This case is thus unlike *Afran Transport Co.* v. *United States*, 435 F. 2d 213 (C.A. 2), certiorari denied, 404 U.S. 872, cited by petitioners. That case involved the separate question whether another vessel involved in a shipping accident was contributorily at fault. The issue of contributory fault is not in this case. Nor does this case concern the various exceptions to liability contained in the Federal Tort Claims Act, that were at issue in another case cited by petitioners, *Somerset Seafood Company* v. *United States*, 193 F. 2d 631 (C.A. 4). The case at bar was instituted under the Suits in Admiralty Act.

is amply supported by the evidence.[4] There is thus no warrant for further review.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

---

[4] If Pilot Lappe had indeed relied on the May 3 channel statement as reporting depths in the 25-foot channel rather than in the 40-foot "project" channel, he never would have left Philadelphia. The Gerwi had to pass not only through the Torresdale Range on its way to Morrisville, but also through, among others, Keystone Range, Landreth Range, Newbold Range and Whitehill Range, all of which had less than 28 feet of water according to the May 3 statement (Pet. App. A7). Thus, as the court of appeals pointed out (Pet. App. A46-A47), Pilot Lappe "could not have been relying on that May 3, 1963, statement as an accurate statement of depths in all those portions of the river to be traversed by his vessel drawing 27 feet 11 inches."

[5] Petitioner's reliance on *Indian Towing Company* v. *United States*, 350 U.S. 61, is misplaced. The court below did not hold, as petitioners suggest (Pet. 10), that the United States need not use due care in publishing its channel statements. Compare *Indian Towing Company, supra*, 350 U.S. at 69. Rather, it found it unnecessary to consider whether the May 3 statement had been negligently drawn (Pet. App. A46), since, on this record, it was clear that "the Government publications received in evidence" had not been relied on by the pilot or crew of the Gerwi, and thus "were not the cause of the vessel's grounding" (Pet. App. A45).

Petitioner also relies on two early decisions of this Court dealing with the question of the vicarious liability of the ship owner due to the negligence of the vessel's pilot. See *The China*, 7 Wall 53, and *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale Transatlantique*, 182 U.S. 406. Those cases are, however, inapposite in the present context; the issue of the ship owner's liability for the Gerwi grounding has never been litigated.